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**VIA FEDERAL EXPRESS**

Mr. William F. Caton, Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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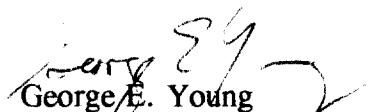
Re: CC Docket Number 96-128

Dear Mr. Caton:

Please find enclosed an original and 14 copies of the initial comments of the Maine Public Utilities Commission, the New Hampshire Public Utilities Commission, the New Mexico State Corporation Commission, the Vermont Public Service Board, and the Vermont Department of Public Service in the above docket. Also enclosed is a diskette copy of the comments in WP 5.0 format.

I also enclose one additional copy, marked "STAMP COPY." Please date stamp this copy and return it to me in the enclosed postage-paid envelope.

Sincerely,

  
George E. Young  
Associate General Counsel

Enclosure (postage-paid envelope)

cc: filing states

0714

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

\_\_\_\_\_  
In the Matter of )

Implementation of the )  
Pay Telephone Reclassification )  
and Compensations Provisions of the )  
Telecommunications Act of 1996 )  
\_\_\_\_\_

CC Docket No. 96-128

INITIAL COMMENTS OF

THE STATE OF MAINE PUBLIC UTILITIES COMMISSION  
THE STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
THE STATE OF NEW MEXICO STATE CORPORATION COMMISSION  
THE STATE OF VERMONT PUBLIC SERVICE BOARD AND DEPARTMENT OF  
PUBLIC SERVICE

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The Maine Public Utilities Commission, the New Hampshire Public Utilities Commission, the New Mexico State Corporation Commission, the Vermont Public Service Board, and the Vermont Department of Public Service (collectively, the "Commenting States"), submit these Initial Comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") in this Matter. The Commenting States address two issues: rates for coin calls from pay stations and the criteria for public interest payphones.

The Commenting States urge the Commission to adopt final rules for pay phone compensation that allow states to establish the local coin rate. Not only does this represent sound practice, allowing states to continue the existing flexibility to tailor payphone rates to specific state considerations, but it is also supported by the plain language of the Telecommunications Act of 1996. Section 276 of that Act does not authorize the Commission to establish a national payphone rate, as the Commission proposed in the NPRM.

On the issue of public interest payphones, the Commission should defer to states to determine, pursuant to their statutes and regulations, which payphones should be treated as "public interest payphones." States, in turn, should retain the discretion to determine whether to implement statewide standards or leave such decisions in the hands of local government.

#### **I. STATES SHOULD RETAIN THE AUTHORITY TO SET LOCAL COIN RATE**

In its NPRM, the Commission proposes three alternatives to ensure that payphone service providers ("PSPs") are fairly compensated for coin calls: (1) set a nationwide local coin rate binding on all states; (2) set guidelines that must be used by the states in setting

local coin rates; (3) allow states to continue to set local coin rates and examine the reasonableness of those rates only upon a complaint to the Commission. ¶¶ 21 and 22. The Commenting States believe that any rule that prescribes or limits the state's flexibility to establish pay phone rates exceeds the Commission's authority. Assuming the FCC has any authority to address the retail rate for local coin calls, the Commenting States support the third alternative. Furthermore, the commenting states believe the state determination should be given great deference in any complaint to the Commission.

The Commission's proposal to establish a nationwide local coin rate is not supported by Section 276 of the Act. Section 276 is intended to eliminate subsidization of payphones from monopoly rates. Elimination of such subsidization will promote competition among payphone providers. The Commission, in implementing section 276, is required to ensure fair compensation for calls and to eliminate specific subsidies. Section 276(b). These provisions do not authorize retail coin rate setting by the Commission, however. Instead, the Commission can and should meet the requirements of this section directing states to ensure that subsidization of payphone services does not occur; such a direction would, however appropriate, leave wide areas of discretion to the states in setting the specific rate.

Moreover, to the extent that the Commission's rules would extend beyond Bell Operating Companies ("BOCs"), it is overbroad. Section 276 deals solely with BOC-provided payphones, prohibiting BOCs from subsidizing payphone service from telephone exchange service operations or exchange access operations and from discriminating in favor of BOC payphone service. Section 276(a). The prohibitions in section 276 do not, by its plain terms, apply to all payphones, including those provided by other local exchange carriers

("LECs") or COCOTs. Nonetheless, one option in the Commission's proposed rule would establish national coin rates applicable to all LECs, not merely BOC-owned phones. This broader applicability exceeds the authority conveyed by Section 276.

The Act's structure lends support for this interpretation of the Act. Section 276 appears in the new Part III of Title II of the Communications Act of 1934 as amended. Part III is entitled "SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES." All of the other sections in Part III apply exclusively to BOCs, governing such things BOC entry into InterLATA service, BOC electronic publishing and manufacturing, and BOC provision of alarm monitoring services. Section 276 is consistent with the limited applicability of Part III. As noted, Section 276(a) establishes specific requirements applicable to BOCs, not other LECs.

The legislative history of § 276 also points to the conclusion that the legislation did not intend to encompass payphones other than those operated by BOCs. The Conference Committee that produced the final version of the legislation based Section 276 on provisions in the House telecommunications bill. The Conference Committee described the House provision as directing "the Commission to adopt rules that eliminate all discrimination between BOC and independent payphones and all subsidies and cost recovery for BOC payphones from regulated interstate or intrastate exchange or exchange access revenue." Consistent with the language of Section 276, the Conference Committee Report refers to BOC payphones, not LEC payphones. The provisions in paragraph (b) of Section 276 are referred to as "implementing regulations," clearly referring back to the language just quoted.

Considering the limitations in the authority conveyed by Section 276, the

Commission's rules cannot apply to payphones owned by LECs other than BOCs. The final rule must reflect this limitation.

It is also clear that a single national coin rate or national guidelines would not meet the Act's requirement that rates be just and reasonable and the requirement of § 276(a)(1), which do not permit a BOC's payphone service to be directly or indirectly subsidized by its local exchange service or exchange access operations. Nor would they successfully ensure fair compensation for PSPs. A single averaged national rate would by definition allow some BOCs to over-recover and some other BOCs to under-recover since the cost of providing coin service varies considerably among different areas of the country. A local rate that is subsidy free in one area may not be subsidy free in all areas. Similarly, a rate that is subsidy free in all areas may be so high that it would not be just and reasonable in those areas where costs are low.<sup>1</sup> Neither a national rate nor national guidelines can properly account for local variations in the cost of local payphone coin calls due to terrain, population density, and differences in the component costs of a local coin calls such as the cost of a public access line and measured service. Such rates would exceed a reasonable interpretation of fair compensation for the payphone provider as well. Thus, in order for local coin rates to be just, reasonable, and subsidy free, they must be set on the basis of fairly disaggregated cost data. The commenters submit that at the very minimum rates should continue to be set for

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<sup>1</sup>In the absence of any factual showing that any existing local coin rates are subsidized there is no need for the Commission to take any further action in this regard at this time. The long run marginal cost of local coin call is probably only a few cents per minute. As the Commission suggested in note 64 of the NPRM, a rate is not "subsidized" unless it fails to cover its marginal cost.

each individual state.<sup>2</sup>

National guidelines or a single national rate would also limit the state's abilities to respond to particular local conditions, which, as the Commission notes in ¶ 22 of the NPRM, existing local coin rates have been designed to do. Setting local coin rates requires a balancing of several policy issues generally left to the states such as universal service and public health and safety. Different states may and should be permitted to balance these issues differently so long as in doing so they ensure that PSPs are fairly compensated for local coin calls. The ability of states to establish policies that take into consideration local conditions while still assuring that companies receive fair compensation would be foreclosed by a national local coin rate. In Maine, for example, the Public Utilities Commission received numerous complaints regarding the fact that children could not call home from their schools in many areas of the state without incurring toll rates. In response to that concern, the Maine Commission adopted two local coin rates set at different levels; one covering the existing local calling area for the exchange (25¢) and another covering calls to all exchanges within 20 miles (30¢). The second kind of local coin rate, although subsidy free and reasonably compensatory, might be precluded by a nationally mandated rate.

The requirements of § 276(b)(1)(A) that the Commission established per call compensation plans does not translate into authority to prescribe a retail local coin rate. The retail coin rate covers not only a portion of the cost of the pay phone instrument (arguably the "compensation" amount) but also the network costs the coin phone provider must pay to the

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<sup>2</sup>To the extent that the rate should take into account the cost of the loop (for PPOs, the Public Access Line (PAL)), these costs vary widely from state to state.



LEC to terminate the local call. Historically, the term "compensation" has been used as a "term of art" to refer only to compensation from carriers to payphone owners, e.g., for dial-around calls. See 47 CFR § 64.1301. The term "compensation plan" as used in 47 USC § 276(b)(1)(A) and (B) implies a similar scope. The per call compensation plans that are envisioned by § 276(b)(1)(A) are those that will replace (1) the existing compensation arrangements under Part 69 that require a portion of the Carrier Common Line Charge paid by carriers to cover the cost of LEC provided payphones, (2) the existing contracts between private payphone providers and inter- and intrastate carriers, and (3) the flat \$6.00 rate paid by *interexchange* carriers to payphone owners to compensate them for "dial-around" traffic. The existing compensation schemes all involve compensation by carriers to the owner of the payphone instrument. Nothing in § 276 provides a legal or public policy basis to redefine the term compensation to include retail coin rates.<sup>3</sup> The FCC has separate, preexisting, authority to regulate coin rates for interstate toll calls. The states have existing authority to regulate intrastate local coin rates. If Congress had intended that the FCC's rulemaking authority under section 276(b)(1)(A) should extend to coin rates, it would have referred to "rates" as well as to compensation. For local sent paid coin traffic there is no need or authority to establish a "compensation" plan. End user revenues are paid directly to the payphone owner, and there is no compensation by carriers. Accordingly, although the FCC, under § 276(b)(1)(B) must ensure that local coin rate is not subsidized by local exchange or exchange

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<sup>3</sup>In Footnote 64, the Commission suggests that subsidized rates may not fairly "compensate the payphone owner for the call." However, the solution to this problem is to insure that BOC local coin rates are subsidy free and not to bootstrap the Commission's authority under § 276(b)(1)(A) into actually establishing a "compensatory" retail local coin rate authority.

access revenues, under § 276(b)(1)(A), it does not have any further authority over local coin rates.

Even if the Commission concludes that the Act requires it to set the per call "compensation" payphone owners receive for each local call, the Act does not give the Commission authority to set a national retail rate. The retail local coin rates must cover not only a portion of the cost of the payphone (arguably the compensation amount) but also the cost the payphone provider must pay to the LEC to terminate the local call. Because both the cost of payphones (including maintenance) and network termination costs and rates which are set by the states vary widely between jurisdictions, a single national coin rate would not be reasonable even if the Commission has the legal authority to set such a national rate.

For the same reasons, even a nationally set "compensation amount" would not be reasonable. Because most of the costs of the payphone are not incremental to local coin service, just compensation for local calls will depend on what compensation amounts are paid for all other calls originating from the payphone, as well as the actual cost of the payphone (included maintenance). The setting of local coin compensation inevitably involves the allocation of joint and common costs at the payphone. Because there is not one economically "correct" method of allocating those joint and common costs, state commissions should be given wide discretion in how they allocate the use of the payphone between the various services it provides. If the Commission acts in this area, it should only require that the total of all the compensation received by the payphone owner from all sources fairly compensates the payphone owner for the use of the payphone instrument.

If the FCC decides that it should adopt the second alternative, guidelines that the states

would have to follow in setting local coin rates, the commenting states believe that the Commission should set forth a more precise proposal than that contained in the NPRM File. 5 U.S.C. § 553(b)(3) (the Federal Administrative Procedure Act (APA)) allows federal agencies in rulemakings simply to set forth a "description of the subjects and issues involved." The only issue described in the NPRM is whether the FCC should "prescribe specific national guidelines." It only asks "what factors such guidelines should consider," without any description of even the general nature of such "factors." The FCC has not set forth any particular proposed guidelines or even a discussion of what guidelines it might consider. If the FCC has any particular pricing model or price level in mind that it believes constitutes "fair compensation," it is unclear what the model or pricing level is. To adopt specific guidelines after characterizing the issue primarily as whether it should adopt guidelines, but without describing the issues involved in determining what those guidelines should be, may well fail to describe the issue sufficiently under the notice requirements for rulemakings under the federal APA.

Should the FCC decide to adopt the guidelines anyway, the Commenting States believe that it should adopt guidelines that leave a reasonable amount of flexibility to the states. The Commenting States suggest that the local coin rate should meet federal guidelines if it recovers long-run marginal costs, a reasonable level of the embedded costs attributable to coin service (taking into account that joint and common payphone costs are recovered from a variety of sources) and a reasonable level of other joint and common costs (similar to the portion obtained through local rates generally). This is consistent with the Commission's proposal in Docket 96-98 for pricing of interconnection elements.

Whether under the Commission's second option (guidelines) or the Commission's third approach (an appeals process), Chairman Hundt's comments in his separate statement suggest that use of a more global approach than merely a determination of whether the local coin rate is itself compensatory. Provided that the compensation amount rate at least covers marginal cost (and therefore is not subsidized by local service or by exchange access), states should have some flexibility in determining what constitutes fair compensation. Beyond recovering direct costs (e.g., equipment for coin storage and the cost of collecting coins), there should be flexibility in determining the extent to which the local coin rate, or any other revenue source for payphones, recovers joint and common costs. Indeed, precision is almost impossible, inasmuch as so many of the costs are joint and common and, because many widely different allocation methods can be considered reasonable. Chairman Hundt's approach suggests that rather than attempting to determine whether the local coin rate (or any other payphone rates or compensations) are fairly compensatory, it would be proper for a state to consider the overall level of compensation and overall costs.

## **II. THE COMMISSION SHOULD ALLOW STATES TO SET STANDARDS FOR PUBLIC INTEREST PAYPHONES**

Section 276(b)(2) requires the Commission to "determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, locations where there would not otherwise be a payphone, should be maintained, and if so, ensure that such payphones are supported fairly and equitably" (176).

The Commission seeks comment on:

- whether it would be in the public interest to maintain such payphones (§ 77);
- whether to prescribe federal regulations for the maintenance of public interest payphones (§ 78);
- whether Section 276 of the Act requires the Commission to assume responsibility for public interest payphones (§ 78);

Further, the Commission requests comments on three alternatives to ensure maintenance of public interest payphones:

- First, prescribe federal regulations for maintenance of these payphones (§ 78);
- Second, establish national guidelines and specify how the guidelines should be applied (§ 79); or
- Third, defer to states by allowing states to determine their own guidelines (§ 81).

At § 82, the Commission requests comments on an appropriate funding mechanism to support public interest payphones.

All payphones serve the public interest by virtue of their convenience and accessibility in times of emergency. Some payphones have been deployed by LECs at the request of state or local public safety agencies in locations that would otherwise not financially support a public payphone. To determine whether public interest payphones truly promote the public interest, it is also appropriate to consider the costs incurred, directly or indirectly, in providing phones at uneconomic locations.

It would be feasible for a state to adopt a statewide siting policy for public interest payphones (such as California has) which, in effect, determines the target level of public safety, welfare and convenience.<sup>4</sup> A national or statewide policy also entails a decision regarding the amount of public resources that will be expended to achieve that level.

It is hard to conceive of national regulations or guidelines that would adequately and economically prescribe locations or criteria for public interest payphone locations. More typically, such resource allocations and siting standards have been handled case-by-case by local authorities or incumbent LECs. The concerns and considerations in public interest payphone siting are often subtle, subjective, and not conducive to prescription by regulation. Formulaic regulations or guidelines will be at risk of wasting public resources while, at the same, not ensuring that public interest payphones are maintained at the present or desired levels. In the view of the commenters, such decisions are most appropriately left in the hands of local public safety officials, such as police, fire, rescue, and public welfare agencies of towns, counties, cities and states. These entities are best situated to understand the requirements of the public, and to balance the promotion of public interest objectives with resource allocations decisions.

It is also appropriate that responsibility for funding public interest payphones fall upon the party that prescribes any siting standards. Any federal regulations or guidelines that would impose the responsibility to implement such regulations or guidelines on state or local governments, without also providing federal or interstate service-derived funding would

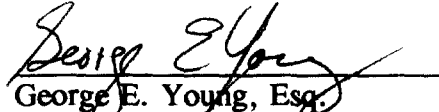
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<sup>4</sup> Alternatively, a state acting as an aggregator for local government, or other state public state or social service agencies, might solicit bids and negotiate for provision of public interest payphones.


constitute an unfunded mandate. The Commission should, therefore, prescribe federal regulations (§ 78) or guidelines (§ 79) only if it concurrently creates a funding mechanism that derives funds from the jurisdiction over which the Commission has authority -- interstate service.

Some state legislatures and commissions may wish to follow California's model, and establish state guidelines. The Commission should not create impediments to such initiatives, so long as they are competitively neutral and otherwise consistent with the underlying principles of the Act. To the extent that state commissions, or state governments generally, do not already have authority to establish standards, funding mechanisms, and administrative means for ensuring maintenance of public interest payphones, the Commission ought to confer that authority. State-prescribed plans could be funded from a number of sources, including general appropriations and state Universal Service Funds. The Commission should not, and perhaps lawfully cannot, limit the funding options for state administered plans.

for the  
VERMONT PUBLIC SERVICE BOARD

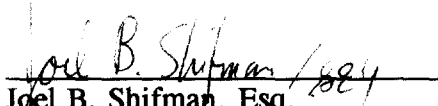
  
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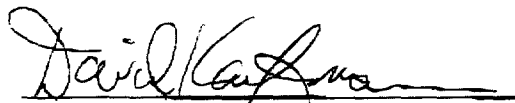
for the  
MAINE PUBLIC UTILITIES  
COMMISSION

  
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FCC NPRM Docket No. CC 96-128  
July 1, 1996

for the

New Mexico State Corporation Commission

A handwritten signature in cursive script, appearing to read "David Kaufman", is written over a horizontal line.

David Kaufman, General Counsel  
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